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In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY

YESHIVA UNIVERSITY FACULTY ASSOCIATION, PETITIONER

v.

YESHIVA UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 582 F.2d 686. The decision and

order of the National Labor Relations Board (Pet. App. 45a-62a) are reported at 231 N.L.R.B. 597. The Board's decision and direction of election in the underlying representation proceeding (Pet. App. 63a-79a) are reported at 221 N.L.R.B. 1053.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on July 31, 1978. The petitions for a writ of certiorari were filed on November 27, 1978 (No. 78-857) and December 19, 1978 (No. 78-997), within the period for filing as extended by Mr. Justice Marshall. Both petitions were granted on February 21, 1979 (A. 3, 4).[1] This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether faculty members who participate in decision-making regarding the hiring, compensation, and promotion of the faculty and the academic standards of the university are managerial or supervisory employees excluded from the protections of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are reproduced below.

---

[1] "A." refers to the joint appendix filed in this Court.

Section 2, 29 U.S.C. 152, provides in pertinent part:

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

Section 8(a), 29 U.S.C. 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * [or]

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) * * *.

* * * * *

STATEMENT

1. In 1974, the Yeshiva University Faculty Association (the Union) filed a representation petition with the Board seeking certification as the bargaining agent of the full-time faculty members of most of the schools at Yeshiva University (the University) (Pet. App. 65a-66a).[2] The Board held a representation hearing during which evidence was presented showing the size and structure of the University, its system of internal governance, and the role of the faculty in the operations of the University. The evidence showed that the University is a private educational institution,[3] chartered by the State of New

[2] The Union did not seek to represent the faculty of the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, the Yeshiva High School, or any of the theological programs affiliated with the University (Pet. App. 65a-66a). (At the time of the Union's representation petition, Yeshiva University did not have a law school.)

[3] The University's charter provides for governance by a self-perpetuating Board of Trustees (A. 784). The charter contains no provision for control by any religious body or institution, and expressly provides that "[p]ersons of every religious denomination shall be equally eligible to offices and appointments" (A. 785, 7).

York, with facilities located on four campuses in New York City (Pet. App. 64a). Approximately 2,500 full and part-time students attend the schools of the University involved in this proceeding (Pet. App. 5a-6a). Those schools have approximately 209 full-time and 150 part-time faculty members (A. 1282-1285, 1315-1325, 1338-1340, 1342-1343, 1355-1356, 1371-1372, 1399-1400, 1411-1413, 1417-1422).[4]

The ultimate policy and decision-making body at the University is the Board of Trustees, on which no faculty members sit (A. 39, 729, 1187). The University President, who is the chief executive officer of the University, is a member of the Board of Trustees (A. 39, 229, 1187-1188). The next stratum of the University administration consists of the Vice-Presidents for Academic Affairs, Business Affairs, and Student Affairs (A. 6, 39-40, 116-117). Administrative officers with more limited areas of responsibility include the Registrar, Bursar, and Director of Admissions (A. 1177-1178). The chief administrative officer of each of the schools is the dean or director, who serves as "the liaison officer between the programmatic activities of the school and other schools

[4] The schools involved are: Yeshiva College ("Yeshiva"), Stern College for Women ("Stern"), Teachers Institute for Women ("Teachers"), the Erna Michael College for Hebraic Studies ("Erna Michael"), the James Striar School of General Jewish Studies ("James Striar"), the Yeshiva Program, the Bernard Revel Graduate School ("Revel"), the Wurzweiler School of Social Work ("Wurzweiler"), the Ferkauf Graduate School of Humanities and Social Sciences ("Ferkauf"), and the Belfer Graduate School of Science ("Belfer") (Pet. App. 64a n.1). These schools are referred to collectively as "the University" unless otherwise specified.

[within the University] and the central administration" (A. 94), and reports and is responsible to the academic Vice-President and the President (A. 21-22, 245-246, 320).

The Executive Council of the University, whose members are appointed by the President with the concurrence of the Board of Trustees, consists of the deans and directors of the various schools, and the directors of various administrative divisions (A. 41-42). It normally meets twice a month and has within its purview "all of the academic and administrative problems of the university." It is "primarily a recommending body," suggesting policies and procedures "to the president who then issues directives" (A. 42).[5]

The administration also has various committees. For example, the budget committee, which is appointed by the President and, at the time of the Board hearing, consisted of the Vice-President for Business Affairs, the Registrar, and the Dean of Erna Michael, formulates the budget for each component school and the institution as a whole (A. 121-122). Financial guidelines of university-wide application—such as freezes on hiring of non-academic personnel and on faculty salaries, suspension of sab-

[5] The role of the Executive Council in University governance is illustrated by a recent change in tenure policy. The new policy was initially formulated by Council member Bacon, Dean of Yeshiva College, who consulted with Faculty Welfare Committees (discussed on page 17, *infra*) of various schools in the University. Dean Bacon then presented the proposal to the Executive Council, which made certain changes, and finally presented it through the President to the Board of Trustees for ultimate approval (A. 292-293).

batical leaves, and budgetary restrictions, which were imposed in the early 1970s due to a University fiscal crisis—are formulated by the budget committee and submitted to the Executive Council. They are then submitted to the President for final approval (A. 121-130, 67-68, 696-697). The budget for each individual school (and for departments within larger schools) is drafted initially by the dean of the school or the department chairman who, after meetings with the budget committee, submits the draft to the Vice-President for Business Affairs. The Vice-President for Business Affairs reviews it with the budget committee and then submits it to the President for approval (A. 89-90, 125-126, 545-547, 661-662).[6]

The Faculty Handbook prescribes policies and procedures of university-wide application (A. 1177-1210). Final determination of the Handbook's contents is made by the Executive Council, with the approval of the President and the Board of Trustees. When changes in the Handbook are to be made, faculty committees at the various schools are "asked to make comments" to the appropriate University committee (A. 83-84, 115-116). University-wide policies applicable to the full-time faculty[7] at all schools gov-

[6] There is no evidence that faculty members other than certain department chairmen are involved in the development of budgets (except for requesting funds for scientific equipment) (A. 290, 712).

[7] All references are to the full-time faculty unless otherwise noted. Full-time faculty members are required to devote their time exclusively to the University. Permission for outside work can be given only by the President after approval of the dean (A. 10-11, 343, 469, 540, 1189-1190, 1211-1212).

ern the required teaching load, and are determined by the Executive Council (A. 11, 55-56). There also is an administratively determined faculty salary scale,[8] and university-wide tenure, sabbatical, and mandatory retirement policies (A. 64-65, 67, 68, 1181-1182, 1191-1199).[9] The health and disability plans, the group life insurance plan, and the retirement income plan that the University offers to faculty members are university-wide in application (A. 1199-1201).

The University President appoints all full-time teaching personnel, receiving recommendations from the deans and the Vice-Presidents for Academic Affairs and Business Affairs. Dr. Joshua Fishman, Vice-President for Academic Affairs, explained the process as follows (A. 89):

> The deans are in the pivotal position in connection with hiring. The programs with which they are in touch express needs for new faculty to them. The university administration lets them know about the budgetary possibilities. The deans, therefore, together with each other and with the people in the programs try to translate those possibilities into what should be done.

[8] In schools with a pre-set salary scale, faculty members advance along the scale in annual steps based upon rank and years of service, receiving whatever increase the scale allows (A. 135). For schools that have no prescribed scale, and for faculty members who are at the top of the scale, the budget committee determines the appropriate raise in salary, if any (A. 136-138).

[9] The President of the University twice failed to respond to pleas by the faculty of Yeshiva College to reconsider the University's policy of mandatory retirement for tenured professors at age 68, and a third time rejected the faculty position as "baseless" (A. 713, 715-716, 1463-1464).

Some of it could be used for full time faculty or for part time faculty or for other acquisitions.

At any rate, this kind of discussion goes back and forth and normally, depending on the size of a school, some schools are really so small that you would consider them departments, and, therefore, the dean is in touch with the whole faculty and, therefore, he doesn't need anyone else to recommend this to him. But in a larger school it would be the chairman who mostly works with the dean and, therefore, the program faculty of that department or the various departments involved in the program that are communicating with the chairman, he communicates with the dean.[10]

The dean is in touch with other deans.

In other words, it's a pooling of information which is fed to the dean and which is then fed to me and to Dr. Sokol [Vice-President for Business Affairs] and so forth, to the president.

[10] Belfer, Ferkauf, Revel and James Striar are organized into departments and their faculties elect department chairmen (A. 169, 369, 410, 590, 625, 673). Yeshiva's faculty is broken down into divisions, and each division elects a division chairman. In addition, the most senior professor in each academic subject area at Yeshiva and Erna Michael represents the other professors in that area (A. 244-245, 265-270, 306-307). The department chairmen at Stern are recommended by the dean for appointment by the President (A. 209). These chairmen are viewed by the deans as the representatives of the faculty of their respective departments, and have been subject to recall by their departmental colleagues in some cases (A. 410-411, 475, 664). There are no department chairmen at Wurzweiler, Teachers, or the Yeshiva Program, where the faculty acts as a body (A. 374, 496-497).

Dr. Sheldon Sokol, Vice-President for Business Affairs, stated that his "involvement relates to the staffing of individual schools with regard to the fiscal consequences of appointments and * * * expanding or contracting the number or the level of the faculty involved" (A. 120). He added that, unless overruled by the President, he had "an effective veto" over salary recommendations which were inconsistent with University policy, and that, while "we try to approach academic life by arriving at decisions by consensus," he would block any proposals which conflicted with "institutional philosophy or policy" (A. 141).[11]

Recommendations for faculty promotions proceed through a similar process. Vice-President Fishman explained that "[a]ll recommendations for promotions finally wind up on my desk. They start out normally in the faculty member's own department where some consensus is reached that he should be recommended for promotion. * * Normally that then is communicated to the promotion committee of the school, and if that recommendation is * * * acceptable to them, they so recommend to the dean who normally himself has to * * * approve that recom-

[11] Dr. Sokol has never had to exercise his veto power because, "through the process of discussion and cooperation," salary requests have changed significantly from the time they were originally submitted to him. Through this process of discussion, the parties reach "a general consensus and agreement that the appointment could be consummated." Thus, salaries of new faculty members are not set by the schools but rather result from discussions between the deans and Dr. Sokol (A. 141-142).

mendation" (A. 56-57). The recommendation then goes to Vice-President Fishman, who evaluates it on behalf of the President in terms both of the school's requirements for promotion and his independent appraisal of the quality of the candidate's scholarship (A. 57-59). Without Fishman's approval, the candidate could not be promoted (A. 59). Fishman added that the deans frequently discuss potential recommendations with him informally before they are formally submitted "so that they won't run into last minute questions, and so that they don't have to be turned down" (A. 58).[12]

[12] Faculty input into promotion decisions varies from school to school. At Wurzweiler, there is no general faculty involvement; instead, discussion is limited to the dean and the faculty member seeking promotion. If the dean agrees that the request is legitimate, it is sent to the President for approval (A. 529-530). At Stern, an elected faculty Promotions Committee (which includes some department chairmen) solicits recommendations from the candidate's chairman who, in turn, often consults the department's faculty (A. 217-218, 230-233). The committee then submits a recommendation to the administration (A. 218). At Yeshiva, an advisory council of the elected division chairmen makes recommendations concerning promotions to the President (A. 270, 267). Faculty members desiring promotions submit a written request to the council through their division chairman, who, in turn, "by good democratic procedures [tries] to convince the other members * * * that they should vote for such a promotion" (A. 267-268). There is also a university-wide grievance committee—the University Faculty Review Committee—which consists of eight tenured faculty members elected from the various schools. Its function is to review grievances pertaining to promotion (A. 48); its authority is limited to making recommendations to the dean or to the President (A. 1213-1216).

Full-time faculty members at the University are entitled to be considered for tenure after serving a certain number of years (A. 64). Vice-President Fishman testified that at the time when tenure is considered (A. 64-65):

> The deans will first call and come and we will discuss the question, and it will normally be decided in terms of the financial capacity of the university to carry another tenured commitment, and the impact on that department * * *.

He explained that, in addition to the particular school's concern for intra-departmental balance, he had to consider "the school wide balance of tenured versus untenured faculty" and "the whole fiscal side of * * * university planning" (A. 65).[13] Fishman also stated that, while he attempts to reach agreement with the deans in making tenure decisions and generally succeeds in doing so, he has authority to deny tenure in the absence of agreement (*ibid.*).

[13] Input from the faculty regarding tenure decisions varies among the schools. At Ferkauf, department members evaluate candidates for tenure and communicate their written findings through the chairman to the dean, who convenes a council of all tenured faculty members (A. 629-630). A committee of that council screens the department's evaluations and makes a recommendation to the full council, which votes by secret ballot and transmits its recommendation to the dean, who may veto it (A. 632-633, 667). Similarly, at Belfer, tenure recommendations are made by the entire department and are referred to the dean for ultimate decision by the President (A. 419). At Stern, the dean makes his own recommendation but also solicits one from the candidate's department chairman; both recommendations are sent to the President, who makes an independent evaluation and decision (A. 230-231).

Faculty input on matters of university-wide policy is secured through the academic councils—the Council of Undergraduate Schools and the Council of Graduate Schools—which advise the President. These bodies consist of student and faculty representatives elected from their constituent divisions, and appointed University officers (A. 42-44). Their mission is "to enable * * * faculty and students and university administrators * * * to be concerned with the problems that they all face together * * * [and which] arise anywhere in the university" (A. 44-45). The Faculty Handbook describes the duties of the Councils as "the initiation of programs among the various divisions to develop a feeling of University fellowship; achievement of academic excellence; coordination and cooperation among the divisions" (A. 1188).[14]

The faculty's input on questions of university-wide policy is exemplified by the University's consideration of changes in tuition levels. As noted by Vice-President Sokol, the administration makes its final decision on tuition changes after conducting an investigation (A. 140):

> Periodically at my direction or at his own initiative, the university director of finances, analyzes the tuition structure and compares it

[14] In the fall of 1974, the Council of Graduate Schools and the Council of Undergraduate Schools met together as a "committee on academic priorities and resources allocation." This committee, which was chaired by the Vice-President for Business Affairs, met twice but took no action (A. 60, 120-121, 332-333, 329).

> with those tuition structures of other universities and meets with the dean of the school and submits a joint recommendation as to whether the charge should be maintained or revised in some way.
>
> * * * * *
>
> That recommendation is made to me. I in turn submit that recommendation to the university executive council which either recommends it, modifies it and then it is submitted to the president for his approval with my recommendation.

Faculty views can influence the tuition recommendation. For example, the objection of a department chairman that a tuition increase would cause a decline in enrollment due to "the competitive nature of the program" was forwarded by the dean to Vice-President Sokol, who decided against the tuition increase (A. 413 414). Faculty opinion as to the proper amount of a proposed tuition increase also has influenced a dean's recommendation to Sokol (A. 505).

The faculty members at various schools and divisions in the University exercise considerable discretion in determining their own curriculum, grading system, admissions and matriculation standards, and course schedules (A. 189-197, 203-205, 246, 293-294, 308). At several schools, the faculty meets periodically to review the curriculum, recommend changes to the dean, and allocate course offerings (A. 189-190, 250-251, 345-347, 348, 314-315, 411-412, 504). Budgetary control, however, is centralized in the Uni-

versity administration (A. 121-142, 545-547).[15] Vice-President Fishman noted that "budgetarily [the dean] doesn't have the same significant role as he would programmatically" (A. 94, 99-100). Decisions about the academic load a student may carry are made jointly by the school and the Registrar (A. 611).

Faculty members in each school meet formally and informally to discuss and pass resolutions on matters of professional and institutional concern (A. 182-183, 247-249, 308-309, 311, 357-358, 402-403). At Stern, Yeshiva, Belfer, and Ferkauf, the faculty meets four times each year pursuant to written bylaws and/or a constitution approved by the President. (A. 183, 288-289, 400-401, 597). At other schools, the faculty meets when convened by the dean or director. Faculty meetings gen-

[15] A faculty committee at the Belfer School unsuccessfully protested the failure of the administration to provide additional financial support for its chemistry department—a failure that the faculty believed was the cause of the department's loss of state accreditation (A. 721-725, 1469-1470). That loss of accreditation stripped Belfer of its right to grant doctorate degrees in chemistry, thus resulting, according to Professor Ralph Behrends of Belfer, in a "loss in prestige, and loss in standing in the academic community in general, as well as in the field of chemistry * * * [P]eople take it as a reflection upon the chemists who are in the department" (A. 725). The administration, however, believed that "the loss [of accreditation] had occurred because [the chemistry] department was too small or because it didn't include the undergraduate chemistry department in one massive university-wide chemistry department" (A. 723). Accordingly, it decided to unify the various chemistry departments at Yeshiva, and, at the time of the Board hearing, was in the process of doing so (A. 397).

erally are chaired by the dean or director (A. 247, 311-312).

Most schools have faculty and faculty-student committees concerned with curriculum, promotions, admissions, and grading practices (A. 51, 206-207, 250-251, 255-256, 264-265).[16] Faculty welfare committees at most schools negotiate with the University administration on behalf of the full-time faculty concerning increases in the salary scale and other items of employment (A. 134, 163, 220, 233-235, 309-310, 482, 484-485, 540-544, 674-676, 731-732, 734-735). Thus, the University's decision in 1974 to give faculty members at the highest pay level a 5% raise was discussed in advance with the welfare committee (A. 136-137).

2. Based on the foregoing facts, the Board found the full-time faculty members at the University to be an appropriate bargaining unit, and directed an election in that unit (Pet. App. 63a-79a).[17] In so doing, the Board rejected the University's contention that "no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within

[16] No one contended before the Board or the court of appeals that the faculty is responsible for routine matters of University administration such as procurement of equipment and supplies, building and grounds construction and upkeep, or provision and maintenance of housing and food services.

[17] The bargaining unit embraces all full-time faculty members, including department chairmen, but excluding deans, acting deans, directors, and all other administrative, supervisory, or support personnel (Pet. App. 79a).

the meaning of the Act" (*id.* at 67a). The Board concluded that the "role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different" from what they were in prior cases in which university faculty members were found to be employees (*id.* at 68a).[18] The Board explained (*ibid.*; footnote omitted):

> At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.

The Union won the election "by a substantial margin" and was certified by the Board (Pet. App. 4a). The University refused to bargain, contesting the validity of the certification. The Board, upon charges filed by the Union, found that the University had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and issued a bargaining order (Pet. App. 45a-60a).

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[18] See *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971); *Fordham University*, 193 N.L.R.B. 134 (1971); *Adelphi University*, 195 N.L.R.B. 639 (1972); *New York University*, 205 N.L.R.B. 4 (1973); *University of Miami*, 213 N.L.R.B. 634 (1974); *Northeastern University*, 218 N.L.R.B. 247 (1975).

3. The court of appeals denied enforcement of the Board's order, concluding that "the full-time faculty has managerial status" (Pet. App. 42a). The court agreed with the Board that the faculty members are professional employees under Section 2(12) of the Act, 29 U.S.C. 152(12), and that their "attributes of professionalism" do not "characterize them as managerial or supervisory" (Pet. App. 26a). However, the court concluded (*id.* at 27a):

> [T]he issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia*, the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the board indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise.

The court attached no significance to the fact that the faculty members exercised their authority collectively rather than individually, reasoning that they could be "managerial employees" even though they exercised authority as a group (*id.* at 28a-32a). The court also concluded that the existence of the Board

of Trustees with ultimate authority did not prevent the faculty members from having managerial or supervisory status, pointing out that business corporations have boards of directors with ultimate authority as well as numerous managerial and supervisory employees (*id.* at 37a-39a). Finally, the court rejected the Board's contention that the faculty exercised their authority on their own behalf and not that of the University. The court reasoned that, "even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's own best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always coextensive" (*id.* at 33a).

SUMMARY OF ARGUMENT

1. The holding of the court of appeals that every full-time faculty member at Yeshiva University is a "supervisor" or "manager" conflicts with established definitions of those terms. Supervisors are defined by statute as persons who exercise authority over employees "in the interest of the employer" (Section 2(11) of the Act, 29 U.S.C. 152(11)). Congress conceived of supervisors as those persons "traditionally regarded as part of management" (S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947)), as opposed to rank and file employees. Similarly, "managers" are defined as " 'executives who formulate and effectuate management policies by expressing and making

operative the decisions of their employer' " (*NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286 (1974)). Like supervisors, managers are recognized by their alliance with management, as opposed to the rank and file.

These definitions do not apply to faculty members —whose services constitute the employer's "product." When making recommendations to the University administration concerning the appointment, pay, and promotion of other faculty members, and when participating in university governance, faculty members exercise independent professional judgment. They are not expected to, and do not, serve as "representatives of management" in making recommendations or offering advice to the administration. Faculty members express their own views, not those of their employer, when participating in university affairs. Unlike supervisors or managers who represent the employer in its efforts to direct and develop work programs for rank and file employees, faculty members themselves make up the rank and file. Their job is to produce the educational "product," not to oversee other employees or develop policies as agents of the administration.

In light of these considerations, the Board has consistently held that rank and file faculty members are employees with rights under the Act, rather than supervisors or managers. See, *e.g.*, *Adelphi University*, 195 N.L.R.B. 639, 648 (1972) (faculty members do not serve "management's interests in making their decisions, nor are they advised that they are management's representatives in making them");

University of Miami, 213 N.L.R.B. 634 (1974) ("faculty participation in collegial decision-making * * * is exercised in the faculty's own interest rather than 'in the interest of the employer' "). The Board's interpretation is a reasonable one, confining the supervisory and managerial exclusions to those categories of university personnel (such as deans, acting deans, and directors) who are truly "management people," representing the administration in its dealings with employees. The Board's interpretation agrees with the congressional purpose to afford statutory protection to a broad category of "professional employees" (Section 2(12) of the Act, 29 U.S.C. 152 (12)), even those who exercise incidental supervisory authority over other professionals (S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974)). As this Court has noted, the Board enjoys wide latitude in determining which categories of persons are supervisors or managers (*Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 & n.6 (1962); see also *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 290 n.19). The Board's interpretation of the Act should be sustained where, as here, it is rational and consistent with the purposes of the Act. *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978).

2. In this case, substantial evidence supports the Board's finding that faculty members at Yeshiva act in their own interest, rather than the interest of management, and that their role is essentially the same as that of faculty members at other universities (Pet. App. 68a). Mere involvement by the faculty in university decision-making, including decision-making affecting the hiring, salary, and promotion of one another, does not establish that the faculty is aligned in interest with management. To the contrary, these are subjects in which the faculty, as a collective body of professional employees, has a strong interest of its own. Nor does the fact that the administration often agrees with faculty proposals suggest that the interests of faculty and administration are undivided. As in the case of most employment relationships, broad areas of consensus exist at Yeshiva. Through the process of discussion, negotiation, and compromise, disagreement between faculty and administration is reduced to a minimum. But success in accommodating interests does not indicate that interests are identical, or that negotiation is unnecessary to mediate differences that arise.

The facts in this case demonstrate that the faculty has separate concerns from management. The faculty's recommendations reflect its views of what is professionally desirable for particular departments or schools. An over-arching administration, determining policy on the basis of overall needs of the University, has sometimes disagreed with the faculty concerning departmental needs and organization. It has refused to reconsider mandatory retirement proposals, frozen salary levels, and suspended sabbatical leaves. In sum, while the administration and the faculty have common interests in the success of the educational enterprise, their interests also diverge

significantly due to their differing perspectives and functions in the University. The Board's finding that the faculty and University have the separate interests of employees and employer is supported by substantial evidence and should be sustained. *Beth Israel Hospital* v. *NLRB*, *supra*, 437 U.S. at 501; *American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 431-433 (1978).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT FULL-TIME FACULTY MEMBERS AT YESHIVA ARE PROFESSIONAL EMPLOYEES ENTITLED TO THE PROTECTIONS OF THE NATIONAL LABOR RELATIONS ACT

A. Although Supervisors And Managers Are Excluded From The Coverage Of The Act, The Act Protects Professional Employees

The decision of the court of appeals that faculty members are supervisors or managers, rather than professional employees entitled to the protections of the Act, results in the anomaly that no members of the faculty, except part-time teachers with limited involvement in University affairs, are deemed to be employees of the University. The court's interpretation effectively converts all rank and file faculty members into managers or supervisors with no substantial body of employees to oversee. That Congress did not intend such a result is apparent upon examining the meaning of the terms "supervisor," "manager," and "professional employee."

1. Section 2(3) of the Act, 29 U.S.C. 152(3), broadly extends statutory coverage to "any employee," unless a statutory exclusion applies. In the Taft-Hartley amendments of 1947, Congress excluded from the coverage of the Act "any individual employed as a supervisor." [19] Congress excluded supervisors in response to this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), which held that "foremen" were employees with rights under the Act. The Taft-Hartley amendments reflected Congress' judgment that supervisors, such as foremen, were in a category separate from rank and file employees, and that management was entitled to the undivided loyalty of "supervisory personnel, traditionally regarded as part of management." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947). Congress expressed concern that if supervisors could become members of labor organizations affiliated with organizations representing the rank and file, conflicts of interest would interfere with the ability of supervisors to control and discipline employees in the interest of the employer. *Id.* at 4-5; H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1947). The House

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[19] Section 2(11) of the Act, 29 U.S.C. 152(11), defines the term "supervisor" as

> [A]ny individual having authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action * * *. [Emphasis supplied.]

Report also emphasized the distinction between supervisors and rank and file employees, adding that the unionization of supervisors was (*id.* at 14):

> * * * inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, * * * they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

As summarized by this Court, Congress' purpose in excluding supervisors "was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests." *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U.S. 653, 661-662 (1974).[20]

The statutory definition of "supervisor" gives effect to the congressional purpose to exclude from the coverage of the Act those persons who are identified with management as opposed to the rank and file.

[20] By excluding supervisors whose interests were properly aligned with those of management, Congress reaffirmed the statutory purpose identified by the dissenting Justices in *Packard Motor Car Co.* v. *NLRB*, *supra*, 330 U.S. at 499-500: "Congress was intent on protecting the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies. * * * I have used the terms foremen and supervisory employees synonymously. But it is not the label which is important; it is whether the employees in question represent or act for management on labor policy matters."

Section 2(11) of the Act defines supervisors as those persons empowered to exercise specified authority over other workers "in the interest of the employer." It is essential to the definition that the mere exercise of authority is not enough. Congress did not deprive employees of statutory protection on that basis alone. The literal terms of the statute require that the authority be wielded on behalf of and in the interest of management. See, *e.g.*, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 19 (1st Cir. 1977); *International Union of United Brewery Workers* v. *NLRB*, 298 F.2d 297, 303-304 (D.C. Cir. 1961), cert. denied, 369 U.S. 843 (1962); *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 147-148 (5th Cir. 1967); *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F.2d 116, 121 (2d Cir. 1964); *Jas. H. Matthews & Co.* v. *NLRB*, 354 F.2d 432, 435 (8th Cir. 1965).[21]

2. The Act contains no definition of managerial employees, nor does it expressly exclude them from the definition of employee. However, in *NLRB* v.

[21] Congress had no intention to allow the exclusion of "supervisors" to nullify the general grant of protection to "employees." As noted in the Senate Report, "[i]n framing this definition the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, *supra*, at 19; see also H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947). Supervisors were viewed by Congress as distinguishable from ordinary employees. The House report noted that "Supervisors are management people" (H.R. Rep. No. 245, *supra*, at 16), and described the supervisory employee as "the boss" (*id.* at 13).

Bell Aerospace Co., 416 U.S. 267, 286-287 (1974), this Court concluded that, as a corollary of the exclusion of supervisory personnel, Congress necessarily intended to exclude "managerial employees"—defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *Id.* at 288 (quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947)). If the prototype of the supervisor is the "foreman," the prototype of the managerial employee is the "executive," implementing company policy. 416 U.S. at 283-285. But, as in the case of the supervisor, the touchstone for managerial status is a close identification and alliance with management, as opposed to the rank and file. See *id.* at 286-287. This Court's decision in *Bell Aerospace* expressly noted the rationale for exclusion of managerial employees as summarized in *Retail Clerks International Ass'n* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), cert. denied, 386 U.S. 1017 (1967)—that "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 416 U.S. at 288-289 n.16. See also *General Dynamics Corp.*, 213 N.L.R.B. 851, 857 (1974): "managerial status is not conferred upon rank-and-file workers, * * * but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management."

Accord, *Bell Aerospace, A Division of Textron, Inc.*, 219 N.L.R.B. 384, 385-386 (1975).

3. While Congress has expressly excluded supervisors from the coverage of the Act, and implicitly excluded managerial personnel, it has expressly indicated that the statute's protection of "employees" extends to "professional employees." [22] This reflects Congress' awareness of the different role—and different responsibility—of professional, as opposed to managerial or supervisory, employees within the organizational structure. Professional employees are "not defined in terms of their authority 'to formulate, determine and effectuate management policies.' "

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[22] Section 2(12)(a) of the Act, 29 U.S.C. 152(12)(a), defines the term "professional employee" to include:

> any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; * * *

Section 9(b)(1), 29 U.S.C. 159(b)(1), precludes the Board from placing professional employees in the same bargaining unit with employees who are not professional employees "unless a majority of such professional employees vote for inclusion in such unit."

NLRB v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 285 n.13. Rather, the emphasis in defining such employees is on the exercise of independent professional judgment:

> The supervisory exemption is founded upon the assumption of bureaucratic managerial structures widely followed in industry. In a bureaucracy the legitimacy of a decision rests ultimately upon the decision-maker's position in the hierarchy. Moreover, the demands of scientific management militate toward standardization, routinization, and accountability to higher authority. This stands in sharp contrast to the assumption upon which the professions proceed. Lengthy, specialized education gives rise to expertise; it is by resort to professional judgment rather than to hierarchical authority that the legitimacy of a professional decision is to be tested. This in turn yields claims to autonomy in professional work * * *.

Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805, 808 (1977). Moreover, the professional is expected to adhere loyally to the values of his profession, rather than espousing the policies of his organization. See P. Drucker, *Management: Tasks, Responsibilities, Practices* 394 (1974), pointing out that the "allegiance" of professional employees "is to their technical or professional skill, rather than to their organization." Drucker adds that "[t]he psychologist within a personnel department sees himself as a professional—that is, a member of the world of his academic specialty—

rather than as an executive of this or that company (or even as a faculty member of this or that university)." *Ibid.*

Because, however, professional employees frequently make judgments of great importance to management,[23] and sometimes provide substantial direction and guidance to colleagues in carrying out their professional responsibilities,[24] the line separating professional employees from managerial and supervisory employees is not always clear and bright.[25] The problem becomes especially complex when professional employees are vested with significant managerial or supervisory responsibility.[26] Congress has therefore

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[23] See *Westinghouse Electric Corp.*, 113 N.L.R.B. 337, 339 (1955).

[24] See *Wurster, Bernardi & Emmons, Inc.*, 192 N.L.R.B. 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920, 921 (1971); *Sonotone Corp.*, 90 N.L.R.B. 1236, 1239 (1950).

[25] Indeed, during the hearings on the Taft-Hartley amendments, management representatives argued for inclusion of professional employees in the supervisory exclusion, contending that they were part of management. *Amendments to the National Labor Relations Act: Hearings on H.R. 8, etc. Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 1225 (1947); *Labor Relations Program: Hearings on S. 55 & S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 694 (1947). See also Finkin, *supra*, 45 Fordham L. Rev. at 807-808.

[26] In those situations, professional employees may be excluded from the coverage of the Act. See, *e.g.*, *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1267-1269 (1975) (medical personnel); *General Dynamics Corp.*, 213 N.L.R.B. 851,

entrusted to the Board, in the first instance, the task of determining whether the employee in question is a professional employee covered by the Act or a supervisory or managerial employee subject to exclusion. See, generally, *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 & n.6 (1962); *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 290 n.19; *Trustees of Boston University* v. *NLRB*, 575 F.2d 301, 305 (1st Cir. 1978), petition for cert. pending, No. 78-67; *Stop & Shop Companies* v. *NLRB*, *supra*, 548 F.2d at 18; *Westinghouse Electric Corp.* v. *NLRB*, 424 F.2d 1151, 1156 (7th Cir. 1970).

4. As noted above, the basis for the managerial and supervisory exclusions from the Act is management's right to have its representatives accountable solely to it and not to have their loyalty divided. Accordingly, the standard used by the Board to determine whether professional employees are excluded from the protections of the Act is not whether they deal with matters of importance to management, but rather whether they function in a capacity in which they are expected to conform to management policies and are judged according to their effectiveness in carrying out those policies. Only in the latter case can it properly be said that professional employees are acting "in the interest of the employer" or are "aligned with management," rather than merely ex-

858-859 (1974) (engineers); *University of Chicago*, 205 N.L.R.B. 220, 221 (1973) (librarians), enforced, 506 F.2d 1402 (7th Cir. 1974).

ercising their independent professional judgment. As the Board explained in *General Dynamics Corp.*, *supra*, 213 N.L.R.B. at 857-858:

> [M]anagerial status * * * is reserved for * * * those who are closely aligned with management as true representatives of management. Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. * * * A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial.[27]

[27] Because managerial or supervisory authority is, by definition, authority exercised in the interest of management, professional employees acting in their own interest may supervise junior professionals without losing the protection of the Act. Congress has acknowledged that such supervision does not confer managerial or supervisory status. See H.R. Conf. Rep. No. 510, *supra*, at 36, pointing out that the definition of professional employee embraces both the professional and his "junior professional assistants." In enacting the 1974 health care amendments to the statute (Pub. L. No. 93-360, 88 Stat. 395), Congress reaffirmed this principle. See S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974):

[Footnote continued on page 34]

As we demonstrate below, the Board has properly applied these principles to college and university faculties in general,[28] and to the Yeshiva faculty in

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[27] [Continued]

The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.

[28] The University did not challenge the Board's statutory jurisdiction over private, nonprofit colleges before the Board or in the court below. Accordingly, that question is not presented in this case. See *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *Detroit Edison Co.* v. *NLRB*, No. 77-968 (Mar. 5, 1979), slip op. 9-10 n.10.

We note, in any event, that the Act's definition of "employer" contains no exception for nonprofit, private colleges and universities. And, while the Board in *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), indicated that it would not exercise jurisdiction over nonprofit, educational institutions, it expressly did so as a matter of discretion, affirming that the activities of the university did come within the Act and the Board's jurisdiction (*id.* at 425). Therefore, the decision in *Columbia University* "does not undermine the validity of the Board's [subsequent] determination in *Cornell University*, 183 N.L.R.B. 329 (1970), that changing conditions—particularly the increasing impact of such institutions on interstate commerce—now required a change in policy leading to the renewed exercise of Board jurisdiction." *NLRB* v. *Catholic Bishop of Chicago*, No. 77-752 (Mar. 21, 1979) (dissenting opinion of Brennan, J.), slip op. 6-7 n.6.

The Court's opinion in *Catholic Bishop*, *supra*, slip op. 14, refers to legislative history (S. Rep. No. 573, 74th Cong.,

particular.[29] As a general matter, faculty members at private colleges and universities fall within the

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1st Sess. 7 (1935)) indicating that a dispute between "an employer and * * * a critical college professor" would not be a "labor dispute" under the Act because no "unfair labor practice affecting commerce" could result. The Senate Report describes a situation in which an individual professor voices criticism of an employer, and correctly notes that this would not constitute a labor dispute under the Act. A controversy between a faculty body and the college that employs them, in contrast, would give rise to a labor dispute within the meaning of the Act if the controversy had the potential to affect interstate commerce. When Congress amended the Act in 1974 to eliminate the exemption previously accorded to nonprofit hospitals, it noted and approved the Board's policy of asserting jurisdiction over other nonprofit institutions, including educational institutions. See H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 4 (1974); 120 Cong. Rec. 12938 (1974) (remarks of Sen. Williams). See also *NLRB* v. *Wentworth Institute*, *supra*, 515 F.2d at 553-555.

[29] The University did not contend before the Board or in the court below that First Amendment principles affected the application of the statute. In any event, the decision in the *Catholic Bishop* case, *supra*, would not preclude application of the Act even if that issue had been raised. The *Catholic Bishop* case dealt with the Board's jurisdiction over "church-operated" secondary schools. The decision rested on the premise that, since assertion of jurisdiction over church-operated secondary schools would pose "difficult and sensitive questions arising out of the guarantees of the First Amendment" (slip op. 17), it could not be assumed that Congress conferred such jurisdiction absent "a clear expression of Congress' intent" (*ibid.*). Here, in contrast (see note 3, *supra*), the University is not operated by a religious body. Moreover, the institution is a university, not a parochial secondary school. See generally, *Tilton* v. *Richardson*, 403 U.S. 672, 680-682 (1971) (plurality opinion); *Hunt* v. *McNair*, 413 U.S. 734, 743-746 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 750-752, 759-762 (1976) (plurality opinion).

definition of professional employees, rather than supervisors or managerial personnel. The faculty members at Yeshiva do so as well.

B. Faculty Members Are Professional Employees Rather Than Managers Or Supervisors Because They Exercise Independent Professional Judgment When Participating In University Governance

1. *Faculty members exercise independent professional judgment and do not serve as agents or representatives of the university's management*

The facts in this case illustrate a system of university governance that is typical of the American university. That governance system conforms neither to the industrial model in which "authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid" (*Adelphi University*, 195 N.L.R.B. 639, 648 (1972)), nor to the medieval model of true collegial decision-making in which complete power and authority are vested in a group of peers.[30] Rather, the uni-

[30] Western universities arose in the 11th and 12th centuries as guilds of teachers (or, in some cases, students), responsible only to themselves, with no administrative or other controlling body. N. Fehl, *The Idea of a University in East and West* 36-46 (1962); D. Knowles, *The Evolution of Medieval Thought* 153-171 (1962). In later years, universities were established and controlled by governmental or ecclesiastical authorities. O. Carmichael, *Universities: Commonwealth and American* 11, 14, 86-94 (1959). External control has existed in the United States since colonial times. J. Brubacher & W. Rudy, *Higher Education in Transition: A History of American Colleges and Universities, 1636-1968*, 4, 25-31 (1968). As noted in Carmichael, *supra*, at 92-93:

> In the United States the governing body is called a Board of Trustees, a Board of Regents, or a Board of Directors. The original board is usually provided for by the charter of the institution * * *.
>
> * * * * * *
>
> The Board of Trustees is legally the corporation in most institutions. In some, the corporation is a separate and much larger body which holds title to the property. It has complete control over the institution. All educational policies, though formulated by the administration and faculty, must be passed upon by it.

The ultimate authority of the trustees, delegated to managerial and supervisory personnel within the administration (including the President, Vice-Presidents and Deans) shows that the modern university departs significantly from the true collegial model in which ultimate authority rests with a peer group of scholars. See *Adelphi University*, *supra*, 195 N.L.R.B. at 648; *New York University*, *supra*, 205 N.L.R.B. at 5.

versity operates on the principle of "shared authority" through at least two authority systems built into its formal structure: "One is the *bureaucratic* network, with formal chains of command running from the trustees down to individual faculty members and students. * * * The other authority system is a *professional* network, for at all levels there are formal mechanisms for bringing the expertise of the faculty into the decision-making process." J. Baldridge, *Power and Conflict in the University* 114 (1971) (emphasis in original).

Within this system of shared authority, in which faculty members and the administration jointly participate, the faculty is expected to exercise independ-

ent professional judgment. See *Statement on Government of Colleges and Universities*, 52 A.A.U.P. Bull. 375 (1966) (hereinafter "*Statement on Government*")[31] and *Faculty Participation in Academic Governance* (1967) (hereinafter "*AAHE Report*"),[32] which elaborate the respective roles of faculty and administration within the university. The *Statement on Government* notes that faculty members are expected (and entitled) to exercise professional judgment with respect to "curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process" (*id.* at 378). The *Statement on Government* emphasizes that the faculty's participation rests upon the fact "that its judgment is central to general educational policy [and] scholars in a particular field or activity have the chief competence for judging the work of their colleagues * * *" (*ibid.*).[33] As pointed out by the *AAHE Report*, the value of the participation and advice of the faculty depends

[31] This Statement was formulated and approved by the American Association of University Professors, The American Council on Education, and the Association of Governing Boards of Universities and Colleges.

[32] This Report was prepared by a task force of the American Association for Higher Education, a department of the National Education Association.

[33] The *Statement on Government* adds, however, that "[b]udgets, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realization of faculty advice" (*ibid.*).

upon its independence and professional expertise: "the faculty should have wide discretion in the conduct of its professional activities. * * * The governance of institutions of higher education cannot adhere to traditional management concepts of superior-subordinate relationships. Instead, the system of governance should enhance the personal autonomy necessary for maximum intellectual productivity" (*id.* at 20).[34]

In sum, the participation of faculty members in university decision-making regarding faculty status, curriculum, and other matters of academic policy is not a means to implement or effectuate managerial policy. Rather, it is an expression of the faculty's independent professional judgment on subjects of direct importance to the faculty. See Finkin, *The NLRB in Higher Education*, 5 Tol. L. Rev. 608, 618 (1974) (footnotes omitted):

> [F]aculty members are not considered answerable to institutional management in their faculty governance functions. As Baldridge observed, faculty structures merely channel professional opinions on matters of intimate concern

[34] The *AAHE Report* also notes that "[i]f the administration enjoys an advantage derived from its broad perspective on the over-all operations, the faculty commands respect because of its special understanding of the fundamental activities of the institution—teaching and research" (*ibid.*). See also Mason, *College and University Government*, XIV Tulane Studies in Political Science 1 (1972): "Decision-making in the university must involve the teacher-researcher 'on the assembly line' because he chiefly knows intimately what the 'production' of the university is all about * * *."

to the teacher and researcher. "Accountability," as the critics use the term, would have an inhibiting effect on the free flow of opinion for it contemplates the exercise of authority over the faculty member depending on whether or not the administration agrees with the opinions offered. Conversely, faculty criticism of the administration is understood to constitute not a breach of loyalty to the employer but an exercise of academic freedom. In sum, there is no right of control [by the administration over the faculty] essential in a finding of responsibility to management.

2. ***Because faculty members exercise independent professional judgment in their own interest rather than that of management, the Board consistently has held that they are employees covered by the Act***

Since its original exercise of jurisdiction over nonprofit colleges in 1970 (see note 28, *supra*), the Board consistently has held that the involvement of the faculty in university governance does not make them supervisors or managers, even though that involvement touches upon many facets of university life, including the formulation of academic policy. The Board has based that conclusion principally on the fact that faculty members do not espouse "management's interests in making their decisions, nor are they advised that they are management's representatives in making them." *Adelphi University, supra*, 195 N.L.R.B. at 648.[35] See also *New York*

[35] The Board has also noted, in analyzing this question, that faculty members exercise their authority collectively,

University, 205 N.L.R.B. 4, 5 (1973), pointing out that "[t]he faculty is not in the position of management relative to these * * * decisions." Accord, *University of Miami*, 213 N.L.R.B. 634 (1974) ("faculty participation in collegial decision-making * * * is exercised in the faculty's own interest rather than 'in the interest of the employer' "); *Fairleigh Dickinson University*, 227 N.L.R.B. 239, 241 (1976) (faculty members "are not advised to advocate management's interests * * *, nor are they considered management's representatives").

Managerial and supervisory personnel are strictly accountable to management for faithful implementation of managerial policies in rendering their decisions. They are judged accordingly. See, *e.g.*, *NLRB* v. *Fullerton Publishing Co.*, 283 F.2d 545, 550 (9th Cir. 1960). Faculty members, in contrast, are judged by their employer based on the quality of their teaching and research, not on the compatability with administration policy of their recommendations or advice.[36] As summarized by Member Kennedy in

unlike traditional managerial and supervisory personnel who rarely act in large numbers, through councils or plebiscites. The Board has also pointed out that the faculty voice is advisory, and that decision-making authority rests in the administrative hierarchy, headed by the board of trustees. See Pet. App. 68a; *Adelphi University, supra*, 195 N.L.R.B. at 648.

[36] This essential distinction is illustrated by comparing the situation of deans and rank and file faculty members. The university, viewing its overall financial position, may inform its deans of the need for budgetary restraint within their departments. As agents of the administration, the deans are expected to attempt to implement that directive. Faculty

Northeastern University, 218 N.L.R.B. 247, 257 (1975) (concurring opinion; footnote omitted):

> [T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them "managerial" employees. Such influence is not exercised "for management" or "in the interest of the employer," but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations.[37]

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members, on the other hand, although aware of and perhaps sympathetic to administration policies of financial restraint, are free to base their recommendations and advice on their professional assessment of the needs of their departments.

[37] When faculty members, such as deans or department chairmen, exercise supervisory authority, they have been denied the Act's protections. See, *e.g.*, *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904, 906 (1971); *Adelphi University*, *supra*, 195 N.L.R.B. at 642-643; *Syracuse University*, 204 N.L.R.B. 641, 642 (1973); *Fairleigh Dickinson University*, 205 N.L.R.B. 673, 675 (1973). Compare *Fordham University*, 193 N.L.R.B. 134, 138-139 (1971); *New York University*, 205 N.L.R.B. 4, 9 (1973); *Trustees of*

The Board's interpretation is a reasonable one. The concepts of "manager" and "supervisor" do not apply to ordinary members of the faculty. As noted on pages 25-29, *supra*, managerial and supervisory personnel are defined by their representation of management's interests, as opposed to the interests of the rank and file. Congress denied collective bargaining rights to such personnel to assure that they would remain effective agents of management. Congress viewed them as "management people" and "bosses," allied with the employer in its struggle with labor. Faculty members do not have these characteristics. They themselves make up the rank and file. Their services constitute the "product" of the educational institution; the rendering of those services is its production line. Faculty members have the interests of ordinary employees in obtaining pay raises and improving the terms and conditions of employment. They are expected to, and often do, disagree with the administration on university policies. Their role in the university, reinforced by traditions of academic

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Boston University v. *NLRB*, 575 F.2d 301, 305-306 (1st Cir. 1978), petition for cert. pending, No. 78-67.

In the present case, the Board rejected the University's contention that members of its committee on academic priorities and resource allocation, its faculty review committee, its department chairmen, and two assistant deans, were managerial or supervisory employees (Pet. App. 69a-76a). The Board agreed with the University, however, that principal investigators of research and training grants were supervisors, and therefore excluded them from the bargaining unit (*id.* at 76a-78a). The bargaining unit also excludes deans, acting deans, and directors (*id.* at 79a).

freedom, requires that their views be independent. To the extent that they review the work of junior faculty members and advise the administration, that is an exercise of professional judgment, not an assertion of administrative policy. For these reasons, the Board consistently has determined that faculty members are professional employees, rather than supervisors or managers. Its interpretation is entitled to substantial deference. See *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, *supra*, 370 U.S. at 179 n.6; see also *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 431 (1978); *Ford Motor Co.* v. *NLRB*, No. 77-1806 (May 14, 1979), slip op. 7-8.

The appropriateness of deferring to the Board's interpretation is underscored by the fact that Congress, in 1974, expanded the Board's jurisdiction over nonprofit institutions and acknowledged the Board's assertion of jurisdiction over educational institutions (see note 28, *supra*). Prior to that time, the Board repeatedly had expressed the view that faculty members were professional employees with rights under the Act, rather than managerial or supervisory employees.[38] The Board's "construction of

[38] See *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904, 905 (1971); *Fordham University*, 193 N.L.R.B. 134, 135 (1971); *Manhattan College*, 195 N.L.R.B. 65, 66 (1972); *Adelphi University*, 195 N.L.R.B. 639, 648 (1972); *New York University*, 205 N.L.R.B. 4, 5 (1973).

its statutory mandate is entitled to great respect, 'especially when Congress has refused to alter the administrative construction.'" *Board of Governors of Federal Reserve System* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13. Congressional acquiescence is properly inferred where Congress has "revisited the Act and left the practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

3. *Collective bargaining by faculty members is similar to collective bargaining by other professional employees and does not undermine principles of shared authority within the university*

Collective bargaining by faculty members is similar to collective bargaining by other professional groups. Congress contemplated that a wide variety of professional employees would be subject to the Act's protections, including medical personnel, lawyers, accountants, engineers, scientists, chemists, and architects, together with their junior professional assistants. H.R. Conf. Rep. No. 510, *supra*, at 36; S. Rep. No. 105, *supra*, at 19. The purpose of extending the coverage of the Act to professional and nonprofessional employees is the same. Congress intended to promote the peaceful settlement of disputes having the potential to obstruct the free flow of commerce "by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964). On campus, collective bargaining channels into orderly dispute-resolving procedures those controversies between faculty and administration con-

cerning the terms and conditions of employment, the role of the faculty in university affairs, and the faculty's right to representation by a union or other bargaining agent of its choosing.[39]

This statutory purpose is consistent with the needs of university governance. As noted by the Report of the Carnegie Commission on Higher Education, *Governance of Higher Education* 51 (1973):

> We may be involved in a long-term period of greater social conflict in society and greater tension on campus. If so, it may be better to institutionalize this conflict through collective bargaining than to have it manifest itself with less restraint. Collective bargaining does provide agreed-upon rules of behavior, contractual understandings, and mechanisms for dispute settlement and grievance handling that help to manage conflict. * * * Collective bargaining, thus, is one aspect of the rule of law, if and when a rule of law is required.

In light of these considerations, the Carnegie Commission concluded "that faculty members should have the right to organize and to bargain collectively, if they so desire * * *" (*id.* at 43).[40]

[39] As of May 1978, faculty members had selected collective bargaining representatives at 77 private colleges and universities, and had rejected such representation at 41. *Chronicle of Higher Education* 8 (June 26, 1978).

[40] The Commission took no position on the question whether individual faculties should pursue that option, stating that "this is a matter for faculty decision" (*ibid.*). The Act, of course, preserves that option for employees included in the collective bargaining unit. In the present case, the faculty exercised its option in favor of collective bargaining.

Collective bargaining on campus also is consistent with traditional concepts of shared authority.[41] As noted by the *AAHE Report*, collective bargaining by faculty members itself "constitutes a form of shared authority." *Id.* at 15. While the Report expresses a preference for faculty senates as a mechanism for asserting the faculty's interests, it concludes that conventional collective bargaining on behalf of the faculty is not incompatible with the functioning of institutions of higher education (*id.* at 63-65).

Experience has confirmed that collective bargaining serves to implement traditional concepts of shared authority in the university. The Appendix to the Brief Amicus Curiae of the American Association of University Professors, filed in support of the Board's petition for certiorari in this case, summarizes the provisions of 20 collective bargaining agreements negotiated by faculty unions at private institutions of higher education. Those agreements generally provide for faculty involvement in decisions relating to the appointment, reappointment, promotion and tenure of their colleagues. Many agreements also establish procedures for faculty participation in decisions relating to matters of educational policy, such as curriculum, admission and degree requirements. Thus, collective bargaining has not altered the subject matter of shared authority or changed the

[41] Compare Finkin, *The NLRB in Higher Education*, 5 Tol. L. Rev. 608 (1974), with Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63 (1973).

nature of faculty and administrative interchange. Rather, collective bargaining has introduced the mediatory influence of formal negotiation, and, in the process, lessened the likelihood of disruptive labor disputes.

C. Substantial Evidence Supports The Board's Finding That The Faculty's Role At Yeshiva Is Essentially The Same As That Of Faculties At Other Universities And That The Faculty Acts For Itself Rather Than Management

The court of appeals acknowledged that the University's full-time faculty members are professional employees within the meaning of Section 2(12) of the Act and that certain of their attributes—the faculty member's "authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance"—do not confer supervisory or managerial status (Pet. App. 26a). The court concluded, however, that because the faculty members also play a role in determining curriculum, admission and graduation requirements, and the rank, salary, and tenure of one another, "they no longer are simply exercising individual professional expertise," but are "substantially and pervasively operating the enterprise" (*id.* at 27a). Although the court's opinion suggests that this range of shared authority may be unusual (see *id.* at 19a n.9, 27a, 33a-34a, 36a), the same pattern appears throughout the Board's prior cases in this area, as the Board specifically found (Pet. App. 68a). See, *e.g.*, *C. W. Post Center of Long*

Island University, supra, 189 N.L.R.B. at 905; *Northeastern University, supra,* 218 N.L.R.B. at 250; *Fordham University, supra,* 193 N.L.R.B. at 135.

Here, as in the Board's prior cases, mere involvement by the faculty in the decision-making process affecting tenure, promotion, salary, and academic standards is not an indication that the faculty is aligned in interest with management. To the contrary, these are subjects in which faculty-employees have a direct interest of their own because they may concern the terms and conditions of their employment.[42] The Act requires management to negotiate with its employees about subjects that affect their terms and conditions of employment (*Fibreboard Paper Products Corp.* v. *NLRB, supra*) and it may not logically be inferred that employees are representing the interests of management when they attempt to influence management's decision on such subjects. See Finkin, *supra,* 5 Tol. L. Rev. at 616 ("it is not extraordinary for employees to seek to exert influence over matters embedded in an employment relationship * * *, or that management would be responsive to their strongly held desires"). If effective appeals by employees concerning the terms and conditions of employment could convert them into "managers" or "supervisors," then "the Act would be applicable solely to

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[42] The quality and range of course offerings and of other faculty members in the same and related departments obviously affect the program offerings in which a faculty member can participate, the member's professional reputation, and the quality of students to be attracted.

the most powerless and uninfluential employees." *Id.* at 617. In sum, the faculty's assertion of its views on these subjects is a manifestation of its pursuit of its own professional interests, not the interests of the employer (even though the latter interests may often coincide with the former).[43]

Nor was the court below warranted in viewing this as a special case simply because the administration often accepts the faculty's recommendations (Pet. App. 33a-36a). As noted on pages 12-17, *supra*, the agreement between the administration and the faculty is the result of a continuous process of discussion, informal negotiation, and compromise. The persuasiveness of the faculty, and the respect of the administration for the views of this essential portion of the University's personnel, are no grounds for con-

[43] The result of the court of appeals' ruling here is that only part-time teachers at Yeshiva—and other universities that respond to the views of their faculties—are subject to protection under the Act. We submit that full-time faculty members, whose livelihood depends on their employment with the university and who have a greater stake in its affairs, should be entitled to no less protection. The court's holding that all full-time faculty members are managers or supervisors leaves a faculty body made up of many supervisors and few employees. "Such a disproportionate ratio" is a "significant factor" weighing heavily against the finding of supervisory or managerial status. See, *e.g.*, *Quick Shop Markets, Inc.*, 168 N.L.R.B. 180, 182 (1967); *Hills Department Store*, 155 N.L.R.B. 1163, 1170 (1965); *Montgomery Ward & Co.*, 93 N.L.R.B. 640, 643 (1951) ("to find these individuals to be supervisors would create the highly improbable supervisory ratio of approximately one supervisor for each employee").

cluding that the faculty has acted as management's representative.[44]

The suggestion of the court of appeals that the faculty at Yeshiva exercises an unusual degree of influence over University affairs is based on the court's failure to view the faculty's role in the context of shared authority, as discussed on pages 36-40, *supra*. Yeshiva, like the other universities considered in the Board's prior decisions, possesses a pervasive administrative system, presided over by a Board of Trustees and managed by a President, three Vice-Presidents, several deans, and various subordinate administrative personnel. By focusing on the influential role of the faculty within the context of each separate school of the University (see Pet. App. 8a-17a), the court failed to take cognizance of the overarching network of administrative authority which effectively implements university policy and reconciles that policy with faculty advice and demands.

Thus, while the faculty at the University has a significant voice in determining curriculum, admission and graduation requirements, and the rank, salary, and tenure of one another, the record shows that faculty proposals are reviewed by the Vice-Presidents for Academic and Business Affairs as well as the President, who, in addition to making their own appraisals, render their final decisions on the basis of university-wide, institutional considerations

[44] Due to the "mobility of first rate faculty," no college administration can afford to turn a deaf ear to faculty requests. Finkin, *supra*, 5 Tol. L. Rev. at 617.

and policies. While the ongoing process of discussion between the Vice-Presidents and the deans enables them to avoid situations in which the administration must "veto" faculty proposals, the Vice-Presidents do have the power, and are fully prepared, to overrule proposals that conflict with institutional requirements. Moreover, the standards governing faculty appointments and grants of tenure are prescribed in the Faculty Handbook, the content of which is determined by the Executive Council. Likewise, the budget, which limits the range of faculty requests that can be satisfied, is formulated by the administration, not the faculty. Indeed, the only formal bodies on which faculty members serve that consider university-wide issues are the Undergraduate and Graduate Councils, including both students and faculty. These are nothing more than advisory bodies. See pages 7-16, *supra*.

As in the case of other universities in which faculty members have sought certification of a bargaining representative, the sometimes divergent interests of faculty and administration appear of record (see Pet. App. 68a).[45] Thus, the Yeshiva faculty formed

[45] In no institution, of course, are the interests of employer and employee totally divergent. The president of a business corporation and the worker on its assembly line have a community of interest in profitable operations, stable employment, avoidance of strikes, safe working conditions, the control of pollution, etc. Interests diverge, however, when salary raises are demanded, or when requests for improved working conditions entail significant costs. This is true on the campus, as well as in the industrial plant.

"welfare committees" to negotiate with the University concerning the terms and conditions of their employment prior to the filing of the Union's representation petition. The faculty's strong vote for the Union to serve as its representative in future negotiations with the administration also shows that the faculty perceives its interests as being, at least in part, distinct from those of management and as requiring an independent spokesman. The administration's action in unilaterally freezing faculty salaries and suspending sabbatical leaves likewise exemplifies a divergence of interests. So does the failure of the administration to reconsider the University's mandatory retirement policy, despite the requests of the faculty. A final example of divergent interests is the disagreement between the faculty at the Belfer Graduate School and the administration regarding funding for the chemistry department. See pages 7-9, 16-17, 18, *supra*.

In sum, we submit that the record supports the Board's finding (Pet. App. 68a) that "the role and authority of the faculty herein with respect to * * * areas of governance are not significantly different from what they were in [prior] cases" involving faculty bargaining units at universities and colleges. Since the Board's determination of the status of the faculty was based on a reasonable interpretation of the statute, and has a substantial basis in the record, its determination should be sustained. See Section 10(e) of the Act, 29 U.S.C. 160(e); *Beth Israel Hospital* v. *NLRB*, *supra*, 437 U.S. at 501; *Ameri-*

can Broadcasting Cos. v. *Writers Guild, supra,* 437 U.S. at 431-433; *Bayside Enterprises, Inc.* v. *NLRB,* 429 U.S. 298, 303-304 (1977).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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